ORIGINAL

NO. 91-1754

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF ILLINOIS,

Petitioner,

v.

GEOFFREY FREEMAN,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District, Third Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State's petition should be denied because the State seeks review of a decision that does not involve federal constitutional law or a federal statute or treaty, as required by 28 U.S.C. § 1257(a).

2. Whether the State waived any right to seek review by writ of certiorari because it did not present any issue to the Illinois Supreme Court involving federal constitutional law or a federal statute or treaty, as required by 28 U.S.C. § 1257(a).

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JURISDICTION

Because the State's petition seeks review of a state court decision that is not based on federal constitutional law or a federal statute or treaty, as required by 28 U.S.C. § 1257(a), this Court has no jurisdiction to consider the petition.

STATEMENT OF THE CASE

On October 9, 1991, the Illinois Appellate Court ordered a new Batson hearing for the respondent, Geoffrey Freeman, and provided certain guidelines to be followed at the new hearing. (The Illinois Appellate Court's decision is in Appendix A of the State's petition for writ of certiorari.) First, the appellate court directed the trial judge at the new Batson hearing to "weigh the credibility of the prosecutor," and to "make a sincere and reasoned attempt to evaluate the State's explanations." Id. at 5a. Second, the appellate court allowed Mr. Freeman to obtain State-held documents relating to Mr. Freeman's case and to jury selection issues, because such materials would "assist in leading to a just result in ensuring that [Mr. Freeman] had a fair trial by a jury appropriately selected." Id. at 7a. Finally, the appellate court observed that the judge conducting the Batson hearing was not the same judge who presided at trial, and found that the testimony of excluded jurors could be "helpful in determining whether the State's race-neutral explanations are pretextual." Id. at 1a, 8a, 9a. The appellate court based its decision on other state

law decisions and on the facts of the case -- not on any federal constitutional law or federal statute or treaty.

The State did not object to the appellate court's order for a new Batson hearing, but petitioned the Illinois Supreme Court to review the portion of the appellate court's order allowing limited discovery and rebuttal witnesses. The Illinois Supreme Court denied the State's petition. (Copies of the State's petition for leave to appeal to the Illinois Supreme Court, and the order denying the petition, are in the attached Appendix.) In its petition the State contended that the appellate court's decision to allow limited discovery and rebuttal testimony were "without authority," "contrary to Illinois law," that "Batson itself imposes no such requirement," and that the procedures would "delay and lengthen" Illinois' "trial system." Appendix at 10a-18a. The State did not argue that the appellate court's ruling violated any federal constitutional law or federal statute or treaty.[1/]

[1/] The State's Statement of the Case on its face violates Sup. Ct. R. 12(h), which requires the State to "specify the stage in the proceedings . . . at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari."

REASONS FOR DENYING THE WRIT

The State's petition for writ of certiorari should be denied for at least two basic reasons.

First, the petition should be denied because the State seeks review of a decision that is not based on federal constitutional law or a federal statute or treaty, as required by 28 U.S.C. § 1257(a). The State does not contest the appellate court's decision to give Mr. Freeman a new Batson hearing. Rather, the State disputes only the appellate court's decision to allow limited discovery and rebuttal testimony in connection with the new hearing. That decision, made by an Illinois state court based on the specific facts before it, does not implicate any federal constitutional law or federal statute or treaty, and therefore should not be reviewed on a writ of certiorari.

In Batson v. Kentucky, 476 U.S. 79 (1984), this Court applied the Equal Protection Clause to prohibit states from excluding prospective jurors based on race. This Court in Batson held that if the defendant makes a prima facie showing of discrimination in the selection of the jury, the state must provide explanations for excluding prospective jurors that are race-neutral and credible. Id. at 96-100. Regarding the procedures for deciding whether the explanations are neutral and credible, however, this Court deferred to the "variety of jury selection practices followed in our state and federal trial courts" and specifically directed trial courts to use their own procedures to evaluate the state's explanations:

> We decline . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges [of prospective jurors].
>
> ....
>
> In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how to best to implement our holding today."

Id. at 99 and at 99 n.24.

Under this Court's plain language in Batson, the appellate court's decision to allow discovery and rebuttal testimony at Mr. Freeman's new Batson hearing is a discretionary "jury selection practice" -- not a procedure governed by the Equal Protection Clause as the State suggests. Because the appellate court's decision is not based on federal constitutional law or any federal statute or treaty, it should not be reviewed by writ of certiorari. Cf. Jones v. Jones, 938 F.2d 838, 843-44 (8th Cir. 1991) ("[t]his language [from Batson] requires reviewing federal courts to respect state court procedures for treating Batson challenges").[2/]

[2/] The facts here demonstrate precisely why it is appropriate to allow courts to fashion particular procedures for Batson hearings in particular cases. In Mr. Freeman's case, the State offered no contemporaneous reasons for its repeated exclusion of African Americans from the jury, the original trial judge had died during the appeal, and a new judge was assigned to conduct the Batson hearing. The new judge never had the opportunity to observe the excluded jurors first hand, and therefore could not assess the veracity of the State's numerous demeanor-based reasons for excluding African Americans from the jury. Cf. Batson, 476 U.S. at 98 n.21 ("the trial judge's findings . . . largely will turn on evaluation of credibility"). Contrary to the State's assertion that the appellate court required a "full scale trial" (petition at i, 4, 7), the court ordered limited safeguards to help ensure a fair hearing.

Second, even if there could be a federal constitutional issue involved in this case, the State waived any opportunity to present a federal challenge to the procedures ordered by the Illinois Appellate Court, because the State never presented such an issue to the Illinois Supreme Court (or to the Illinois Appellate Court). Under 28 U.S.C. § 1257(a), a party may only seek review of issues presented to "the highest court of a State in which a decision could be had." Although the State filed a petition for leave to appeal to the Illinois Supreme Court, and objected to the appellate court's opinion, the State never argued that the opinion violated the federal constitution or any federal law or treaty. Thus, the State failed to raise any issue that properly is reviewable by this Court on a writ of certiorari.

CONCLUSION

For each of the above reasons, the State's petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

PETITION FOR LEAVE TO APPEAL
AND ORDER DENYING PETITION

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Petitioner, vs. GEOFFREY FREEMAN, Defendant-Respondent.	Petition for Leave to Appeal from the Appellate Court of Illinois, First District, Third Division, Appellate Court Nos. 89-2414 & 89-2500 (consolidated) There Heard on Appeal from the Circuit Court of Cook County, Criminal Division. Honorable MATTHEW J. MORAN Judge Presiding.

PETITION FOR LEAVE TO APPEAL

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I.

PRAYER FOR LEAVE TO APPEAL

Pursuant to the provisions of Supreme Court Rule 315, Ill. Rev. Stat. 1989, ch. 110A, sec. 315, the People of the State of Illinois seek leave to appeal to the Supreme Court of Illinois from a judgment entered in the above-entitled cause by the Appellate Court of Illinois, First District, Third Division.

The appellate court has erred in mandating the admission of testimony of excluded jurors in rebuttal to the prosecutor's race-neutral explanation at a Batson hearing where it cites no relevant authority for its mandate and indeed where it conflicts with a Third District Appellate Court decision, People v. Williams, 177 Ill. App. 3d 787, 532 N.E.2d 1044, 1047 (3d

Dist. 1988) and this Court's decision in People v. Young, 128 Ill. 2d 1, 538 N.E.2d 453, 460 (1989). In Williams, the court affirmed the lower court's similar denial of rebuttal testimony of an excluded juror to contradict the prosecutor's explanations. In Young, this Court indicated similar testimony presented by defendant and his counsel was not required when it affirmed the trial court's denial of the same. Moreover, the Batson decision itself, Batson v. Kentucky, 476 U.S. 79, 109 S.Ct. 1712, 1724 n.24 (1986), imposes no such requirement and certainly did not envision such a proceeding.

In fact, the appellate court's procedural directive regarding rebuttal testimony of excluded jurors has been required in no other jurisdiction in this country. In only one state, North Carolina, has a court required rebuttal testimony at a Batson hearing, and, in that instance, the nature of the testimony was not specified. Furthermore, only one additional state, Maryland, has had a factual scenario wherein the lower court allowed an expanded hearing with rebuttal testimony. The appellate court's decision in the instant case was made without benefit of citation or discussion of these arguable authorities for its position. The opinion does not explain how the proposed testimony could possibly be relevant. Further, this holding regarding the propriety of rebuttal testimony at a Batson hearing was made in the mistaken reliance on this Court's opinions in Young, supra, 538 N.E.2d at 460 and People v. Harris, 129 Ill. 2d 123, 244 N.E.2d 357, 381 (1989) wherein this Court referred to the propriety of a defendant "offering" evidence to rebut, meaning argument, not testimony. Indeed, in Young, as indicated above, this Court actually rejected the argument that a testimonial procedure is required. Young, 538 N.E.2d at 460.

Subjecting jurors to return to court and otherwise be questioned regarding background, mannerisms or quirks beyond the norm would cause undue embarrassment not to mention have a tremendous chilling effect on jury service.

Moreover, the appellate court erred in mandating discovery of the State's Attorney's manuals or policies of jury selection where such a procedure is certainly "trial-type" and well beyond the strictures of Batson and where it was made on only its own authority indicating it was not precluded by this Court's earlier supervisory order, and this Court's decision in People v. Mack, 128 Ill. 2d 231, 538 N.E.2d 1107 (1989).

Furthermore, even assuming the hearing judge was confused by this Court's supervisory order regarding his discretion to implement procedures, it was, at best, incumbent upon the appellate court to remand only with directions clarifying that the judge did indeed have discretion as to these matters, leaving the actual procedural decisions to be implemented by the judge. By actually mandating the discovery and defense testimony, the appellate court has simply eliminated altogether the hearing judge's discretion as to the procedures, contravening Batson itself, Batson, 106 S.Ct. at 1724, n.24, and the overwhelming weight of authority following Batson establishing the judge's discretion. See e.g., Williams, supra, 532 N.E.2d at 1047, 1047; People v. Thompson, 827 F.2d 1254, 1259 (9th Cir. 1987); People v. Davis, 809 F.2d 1194, 1202 N.4 (6th Cir. 1987) (Batson left up to the trial courts the determination of what role defendants were to play once the prosecutor gave his or her explanation). It is most troubling that, by its decision, the appellate court has fashioned a bright line inflexible rule which in effect turns what was intended to be a summary proceeding into a full-blown trial, a disruptive

result which this Court in Young was careful to avoid. Young, 538 N.E.2d at 459-60.

In sum, the appellate court has erred in mandating procedures including rebuttal testimony of excluded jurors and discovery of prosecution manuals of jury selection at a Batson hearing since the order conflicts with the Third District's Williams opinion and opinions of this Court, it ignores these decisions and those on point from other jurisdictions, it utterly fails to indicate how the testimony and discovery could possibly be relevant, and otherwise sweepingly removes all discretion from the trial courts on these matters. In short, this Court must intervene to establish which procedures are mandated as a matter of law and which are left to the discretion and implementation by the trial courts.

II.

HISTORY IN THE APPELLATE COURT

The judgment of the Appellate Court, First District, Third Division, was entered on October 9, 1991. On October 17, 1991, the People filed in the Appellate Court their Notice and Affidavit of Intent to Seek Leave to Appeal to the Supreme Court of Illinois. This filing was sufficient to stay the Appellate Court mandate under Supreme Court Rule 368(b). Ill. Rev. Stat. 1989, ch. 110A, §368(B).

III.

POINT RELIED UPON FOR REVERSAL

The appellate court, by directing a full-blown Batson hearing, wherein jurors are called to testify to rebut the prosecutor's race-neutral explanations and the People are required to answer discovery by producing documents pertaining to jury selection policies, has contravened the decisions of the Third District Appellate Court and this Court, and has exceeded the scope of Batson and the People fail to see how the testimony of jurors could possibly be relevant to the prosecutor's state of mind. Moreover, the Freeman II decision impermissibly strips the lower courts of discretion to fashion Batson hearing procedures and to determine the relevance of proffered evidence.

IV.

STATEMENT OF FACTS

On February 6, 1984, a jury found defendant guilty of the murder and armed robbery of 71 year old Madeline Mullenix. (Indictment No. 81 C 1317). (R. 2097-98)[1] Judge Richard Petrarca presided over the voir dire and trial, and entered judgment on the findings. The jury could not reach a unanimous verdict on the death penalty. (R. C2665) Judge Petrarca thereafter sentenced defendant to natural life imprisonment. (R. 2428)

On direct appeal to the Appellate Court, First District, Third Division, the court found defendant had established a prima facie case of purposeful discrimination, and remanded the cause "with directions that the State be given the opportunity to come forward with a neutral explanation for the exclusion of the black prospective jurors" (R. C3178); People v. Freeman, 162 Ill. App. 3d 1080, 516 N.E.2d 440, 449 (1st Dist. 1987)(Freeman I).

On remand, the cause appeared before the Honorable Matthew J. Moran, since Judge Petrarca had since died. (R. 2886, 2922) For purposes of the Batson hearing, Judge Moran ordered the trial prosecutors to give testimony under oath and be subject to cross-examination. (R. 2900-2901) In response, the People filed a Motion for Supervisory Order to this Court. (R. 2928) This Court allowed the motion and vacated the trial judge's order. (R. 2928)

At the second stage Batson hearing that ensued, one of the trial prosecutors articulated his reasons for excluding the jurors in question. (R.

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[1] Forty relevant pages of the appellate record have been incorrectly paginated. What should be pages 3000-3039 have been numbered 2930-69, causing confusion with the earlier transcript with the same numbers. The earlier, correctly numbered pages 2930-69 will be referred to as 2930A etc., and the erroneously marked pages will be marked 2930B etc.

2931-54) In response, counsel argued the prosecutor's explanations were not sufficient to overcome the prima facie case. (R. 2958-67A, 2983-99, 2930-60B) As part of his case defendant sought "to offer testimony as to the question of voir dire questioning and answering that occurred at Mr. Freeman's jury." (R. 2967A) The judge precluded the testimony concluding:

> I think that ... [testimony] would go beyond the scope of the Batson decision. Particularly, since the Appellate Court has already found there is prima facie evidence of discrimination in the exclusion of these jurors. The court will not permit excluded jurors to be called at this limited hearing. (R. 2967-68B)

The court also ruled regarding defendant's discovery request for "any policies or procedures of the State's Attorney[']s Office in regards to jury selection and the use of peremptory challenges." (R. 2965B) The court stated:

> The State's Attorney[']s Office in the Freeman case has refused to respond to this request and has offered no explanation to clarify their refusal. Under the directives of the supervisory order I have no authority to order response to this inquiry. (R. 2966B)

After hearing the above arguments from counsel, the judge ruled on the ultimate issue, holding the defense had failed to overcome the prosecutor's racially neutral explanations. (R. 2968B) As part of its ruling, however, the court stated the following:

> ...The Court does not find ... [the prosecutor's] explanations to be truthful since he refused to take an oath and to be subject to cross-examination . ..." (R. 2967B)
>
> * * *
>
> I cannot say in view of the restrictions imposed by the supervisory order whether or not I believe ... [the prosecutor]. But, he did state racially neutral explanations and the trial notes which I have inspected support his explanations. (R. 2968B)

On appeal, the appellate court remanded the instant case "for a new Batson hearing." People v. Freeman, ___ Ill. App. 3d ___, ___ N.E.2d ___ (Nos. 89-2417 & 89-2500, October 9, 1991)(Freeman II), slip op. at 11. The court concluded it was "unable to determine whether the hearing judge appropriately weighed the evidence in determining whether there was a Batson violation.". Id. slip op. at 6.[2] The court then issued its procedural "directions" Id., slip op. at 11, indicating 1) defendant was entitled to discovery of the State's Attorney's "training manuals or policies" Id., slip op. at 7, in order to show "a scheme or plan to limit the minority members of a jury..." Id., slip op. at 8; 2) "defendant shall be permitted to offer testimony of excluded jurors for the purpose of demonstrating that the State's race-neutral explanations are pre-textual." Id., slip op. at 10. It is from the court's order directing the above discovery and rebuttal testimonial procedures that the People now appeal.

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[2] Part of the appellate court's difficulty with understanding the nature of the hearing judge's ruling came from its own, Id., slip op. at 4, and defendant's (Deft. Br. 16, n.9), misreading of the judge's comments. The judge's remark that "the record does not contain a reasonable explanation for the use of at least four of the [State's] peremptory challenges..." (R. 2963B) was not, as suggested, made as part of his ruling referring to the prosecutor's explanations at the hearing but rather was referring to the earlier voir dire record which the appellate court had reviewed in Freeman I.

V.

ARGUMENT

THE APPELLATE COURT REMAND ORDER MANDATING DISCOVERY AND DEFENSE TESTIMONY TO CONTRADICT THE PROSECUTOR'S RACE-NEUTRAL EXPLANATION AT A BATSON HEARING WAS MADE WITHOUT AUTHORITY AND IS, IN FACT, CONTRARY TO ILLINOIS LAW. MOREOVER, BATSON ITSELF IMPOSES NO SUCH REQUIREMENT. FURTHERMORE, WITHOUT INTERVENTION OF THIS COURT, THE INFLEXIBLE PROCEDURAL FORMAT REQUIRED BY THE APPELLATE COURT WILL UNNECESSARILY DELAY AND LENGTHEN THE ALREADY OVERBURDENED TRIAL SYSTEM OF THIS STATE.

The appellate court's order remanding the instant cause for a new Batson hearing with the sweeping pronouncement that a defendant is entitled to present testimony of excluded jurors directly contravenes the decision of the Third District Appellate Court in People v. Williams, 177 Ill. App. 3d 787, 532 N.E.2d 1044, 1045-47 (3d Dist. 1988). In Williams, the defendant, in a strikingly similar argument, attempted to call a juror to indicate she did want to serve as a juror to contradict the prosecutor's explanation that he thought the juror did not want to serve. Id. at 1045, 1046. The Williams court framed the issue before it as whether defendant was "entitled to present rebuttal evidence at the Batson hearing?" Id. at 1045, and answered the question with a resounding "no." Id. at 1047. In so deciding, the court analyzed a number of federal cases which have dealt with Batson procedural questions. Id. at 1045-46. See e.g. United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987); People v. Tucker, 836 F.2d 334 (7th Cir. 1988); People v. Tindle, 860 F.2d 125 (4th Cir. 1988). The Williams court noted that the Batson hearing particulars are for the trial court to decide in each particular case and the discretion in fashioning such procedures is broad. Williams, 532 N.E.2d at 1046. The Williams court further noted the Thompson court's explanation of defense

counsel's two crucial functions at the adversary proceeding, both which refer to counsel's presentation of argument. Id. at 1046-47. The Williams court thereafter concluded that the trial court's denial of defense testimony did not constitute an abuse of discretion. Id. at 1047. The court noted though, that it was not concluding that defense testimony was totally prohibited. Id. The trial court also determined that the proffered defense testimony was not relevant because the prosecutor's subjective feelings could not be denied "except by evidence that the prosecutor had expressed feelings to the contrary." Id. at 1046.

The appellate court's decision also conflicts with this Court's opinion in People v. Young, 128 Ill. 2d 1, 538 N.E.2d 453 (1989). In Young, the defendant sought to admit his own testimony, as well as that of his co-defendant and his trial counsel, to indicate that, in their opinion, the juror in question did not hesitate in answering voir dire questions to rebut the prosecutor's explanation that the juror had hesitated. Young, 538 N.E.2d at 460. This Court held the trial court did not abuse discretion in denying the admission of the testimony. Id. See also People v. Mack, 128 Ill. 2d 231, 538 N.E.2d 1107, 1116-17 (1989)(denial of defendant's proffered expert testimony regarding statistical analysis of peremptory challenges was proper where testimony was not relevant to the defense rebuttal stage of proceedings).

The People submit that the hearing judge's ruling prohibiting the testimony in the case at bar was likewise proper. First, as indicated in Williams, relying on a line of federal cases, a defendant at a Batson hearing, at best, is entitled to be present to hear the prosecutor's explanations and respond in argument to point out infirmities in the prosecutor's statement and make a record. Williams, 532 N.E.2d at 1046-47. And, although testimony may

in some instance be appropriate if it bears directly on the prosecutor's state of mind, a defendant is not entitled to it.

The trial court's determination in this case to exclude the testimony was certainly proper since it had little, if any, probative value. Although defendant did not make an offer of proof or otherwise establish his purpose in presenting the testimony at the hearing, it is clear from his brief on appeal that he wanted to dispute such matters as a juror's hesitation, as in Young, supra, or an inability to comprehend. (Deft. Br. 45)

As the Williams court stated, however, the juror's testimony could not serve any useful purpose in rebutting the prosecutor's explanation, unless it involved actually impeaching or contradicting the prosecutor's state of mind concerning his explanation for the challenge. Indeed, in another context, such opinion testimony was found to be irrelevant. See People v. Eshaya, 144 Ill. App. 3d 757, 494 N.E.2d 772, 778 (1st Dist. 1986)(an occurrence witness' state of mind is not telling of the defendant's subjective feelings to prove defendant's claim of self-defense). See also People v. Hooper, 118 Ill. 2d 244, 506 N.E.2d 1305, 1310 (1987)(Clark, J., dissenting)(emphasis in text)(defendant is not in a position to prove a venireman's demeanor did not justify the prosecutor's use of his peremptory challenges). In short, another person's perception or opinion of a demeanor-based explanation simply does not create an inference of pretext.

Defendant's complaint about the subjective nature of peremptory challenges is not novel. And, this Court has noted that demeanor explanations must be reviewed with caution. People v. Harris, 129 Ill. 2d 123, 544 N.E.2d 357, 380 (1989). This does not mean, however, that such explanations are not legitimate. See Young, 538 N.E.2d at 457; Mack, 538 N.E.2d at 1112. To the

contrary, Batson leaves room for a prosecutor to exercise challenges on "hunches" and past experience, so long as racial discrimination is not the motive. State v. Antwine, 743 S.W.2d 51, 65 (S.C.Mo. 1987). Indeed, challenges are a product of subjective analyses of a wide variety of character and personality traits perceived by counsel. See Id. at 66. And, although such traits may not be objectively provable, Batson unequivocally states that explanations need not rise to the level of cause. Id. at 65. See also People v. Cole, 54 Ill. 2d 401, 298 N.E.2d 705, 712 (1973)(determination of impartiality is not a purely objective determination). See also United States v. Roan Eagle, 867 F.2d 436, 442 (8th Cir. 1989)(if peremptory challenges are to continue, the prosecutor's privilege must be awarded substantial leeway).

The appellate court decision has exceeded its authority in mandating procedures where the Batson decision itself imposes no such requirement. In Batson, the court indicated that when a defendant timely objects to a prosecutor's peremptory challenge, the defendant is entitled to make out a prima facie case of purposeful discrimination and, once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. Batson v. Kentucky, 476 U.S. 79, 109 S.Ct. 1712, 1721 (1986). The trial court will then have the duty to determine if the defendant has established purposeful discrimination. Id. at 1723-24. In its decision, the Batson court specifically declined "to formulate particular procedures," Id. at 1724, indicating it was making "no attempt to instruct these [trial] courts how best to implement our holding today." Id. at 1724, n.24. As stated by the court in United States v. Davis, 809 F.2d 1194, 1202 n.4 (6th Cir. 1987), Batson did not fashion any procedural guidelines other than in the cases explaining the prima facie burden of proof rules (referring to Batson's

citation to several Title VII cases). See also Note, Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings, 99 Yale L.J. 187, 191 (1989). See further United States v. Wilson, 884 F.2d 1121, 1127 n.1 (8th Cir. 1989)(Beam, J., dissenting in a 7-6 en banc decision)(nothing in Batson states, or even infers, that a testimonial procedure to rebut an allegedly pretextual explanation is required or desirable.)

Certainly, the Batson court could not have envisioned the disruptive type of procedure which the appellate court has here required. See Young, 538 N.E.2d at 460, citing State v. Jackson, 368 S.E.2d 838, 842 (S.C.N.C. 1988)(the disruption to a trial overbears any good to be obtained by the prosecutor's sworn testimony). As this Court noted in Young, referring to Batson: "There was no suggestion by the court that there was to be what could amount to a trial within a trial." Id. at 459. And, as with the procedure of swearing the prosecutor and subjecting him or her to cross-examination, had the Batson court intended that the defense would be entitled to discovery and to present rebuttal testimony, "it would have been a simple thing for the court to have said so." Id. Certainly, the procedural matters defendant sought here are far more disruptive and imposing than the ones found unnecessary in Young and Jackson, above. Indeed, the People submit the hearing judge here properly exercised his discretion in prohibiting the rebuttal testimony, determining that Batson did not require the same, and indicating that only a limited hearing was warranted.

A mandate such as the appellate court's reversing a trial court's order and directing defense rebuttal testimony at a Batson hearing has occurred in only one other jurisdiction, North Carolina. In State v. Green, 376 S.E.2d 727, 728 (S.C.N.C. 1989), the trial court disallowed rebuttal evidence where

defendant presented an affidavit with names of people he would call. The Green court reversed, indicating defendant was entitled to present evidence tending to rebut the prosecutor's explanations. Id. Accord State v. Robinson, 1991 N.C. Lexis 666, *19 (S.C.N.C. October 3, 1991).

In contrast, as argued above, this Court has specifically declined to entitle defendant with a right to rebuttal testimony. See Young, supra, 538 N.E.2d at 460. The People submit the Young decision is better reasoned and more in line with the body of authority which indicate the procedural decisions are best left to the discretion of the trial court, see Argument, supra at 12-13. Although the above decisions have seemingly left open the door for the defense to present such rebuttal testimony, the People have found only one other jurisdiction, Maryland, where such testimony was actually allowed. See Chew v. State, 562 A.2d 1270, 1277 (S.C.Md 1989)(propriety of rebuttal testimony not specifically at issue, but defense counsel was permitted to testify in rebuttal at the remand).

Furthermore, standards of relevancy still obtain. In Green, it is unclear for what purpose the evidence was offered, whereas, here, it is clear defendant's proffered testimony had little, if any, probative value. Also, in Chew, defense counsel did apparently testify regarding a juror's demeanor stating that in his opinion the juror in question was not "unsmiling" as indicated by the prosecutor. The People submit that counsel's testimony in Chew was likewise irrelevant and the decision is against the weight of authority, see Argument, supra at 10, 11. At any rate, the appellate court did not in any way rely on these cases for support. It is interesting to note that the appellate court did not even discuss or attempt to distinguish the Third District's opinion in Williams, supra, which directly addresses this issue.

Even assuming the hearing judge was confused by this Court's supervisory order regarding his discretion as to procedural matters, it was, at best, incumbent upon the appellate court to remand with directions clarifying the judge did indeed have discretion as to these matters, leaving the actual procedural decisions up to the judge. Cf People v. Queen, 56 Ill. 2d 560, 565, 310 N.E.2d 166 (1974)(error when trial court refuses to exercise discretion in the erroneous belief it has no discretion as to the question presented). By mandating the defense testimony, the appellate court has altogether eliminated the judge's discretion as to the hearing's procedures, contravening Batson, 106 S.Ct. at 1724, n.24, and the weight of authority after Batson establishing the judge's discretion. See Williams, supra, 532 N.E.2d at 1046, 1047; People v. Thompson, 827 F.2d 1254, 1259 (9th Cir. 1987). See also Williams v. State, 767 S.W.2d 872 (Ct.App.Tx 1989). In Williams, the court, sitting en banc, determined in a 7 to 6 decision that a defendant is entitled to present the testimony of witnesses, including the prosecutor, to establish his prima facie case. Id. at 874. One justice, in his dissent, disagreed with the elimination of the trial court's discretion, remarking the court was there imposing a procedure which no other court in the country had described. Id. at 878 (Enoch, J., dissenting)

Defendant's argument below that he was denied his opportunity to rebut the prosecutor's explanation citing this Court's Young decision (Deft. Br. 49), and United States v. Thompson, 827 F.2d 1254, 1258 (9th Cir. 1987) (Deft. Br. 47), is based on a misreading of those cases. In Young, this Court, citing three out of state cases, State v. Slappy, 522 So.2d 18 (S.C.Fla 1988), Ex Parte Branch, 526 So.2d 609 (S.C.Ala. 1987) and State v. Antwine, 743 S.W.2d 51 (S.C.Mo. 1987) stated the following:

> ...a defendant generally should be permitted to offer evidence to rebut the prosecution's explanations for the exercise of peremptory challenges... .Young, 538 N.E.2d at 460.

Defendant has interpreted the "offer evidence" language to mean the presentation of testimony when it is clear this phrase referred to the presentation of argument.

In each of the above cited cases, the court was concerned with rebuttal argument by the defense. See Slappy, 522 So.2d at 20; Branch, 526 So.2d at 624; Antwine, 743 S.W.2d at 65. This is likewise true of the Thompson case, cited by defendant. Thompson, 827 F.2d at 1258. And, in the case at bar, defendant was given ample opportunity to respond where he presented a lengthy and detailed rebuttal argument. (R. 2958-67A, 2983-99, 2930-33B, 2935-41B, 2943-47B, 2949-54B, 2959-60B)

Finally, the appellate court also erred in mandating discovery. The appellate court cites no affirmative authority, but rather says it is not precluded from imposing such a requirement because this Court did not prohibit it either in its earlier supervisory order or in People v. Mack, 128 Ill. 2d 231, 538 N.E.2d 1107 (1989). First, the People maintain that Mack does preclude such discovery as a trial-type procedure. Mack, 538 N.E.2d at 1115. And, in People v. Hope, 137 Ill. App. 3d 430, 560 N.E.2d 849, 873-74 (1990), this Court specifically determined that discovery rules, Supreme Court Rule 412, Ill. Rev. Stat. 1987, ch. 110A, §412, do not apply to post-conviction Batson hearings. As argued above, even assuming such discovery is permissible, such a procedure is a discretionary matter for the trial court. Hence, the appellate court exceeded its authority in requiring discovery of any kind. The

People submit that such manuals or policies of the State's Attorney, if they exist, would constitute work-product and fall squarely within the protections of the work-product doctrine. See Mack, 538 N.E.2d at 1115, citing Ill. Rev. Stat. 1987, ch. 110A, §412(j)(i). Whatever materials are not work product would be devoid of relevance. See Shelton v. State, 521 So.2d 1035, 1038 (Ct. App.Ala Ala.App. 1987)(it is not the duty of the court to evaluate the prosecutor's subjective theory of jury selection). At any rate, as in Young, the disruption that would occur from such a discovery procedure overbears any good which could be obtained therefrom.

In sum, this Court must intervene in the instant matter to correct the appellate court's order directing a procedural format which conflicts with another district of this State and prior decisions of this Court. The court's sweeping order will otherwise cause havoc in the trial courts unnecessarily lengthening and delaying trial matters. The case at bar provides an opportunity for this Court to determine what Batson procedures are mandated as a matter of law and which should be left to the discretion and implementation by the trial court.

CONCLUSION

The People of the State of Illinois respectfully request that this Honorable Court grant their Petition for Leave to Appeal, reverse the decision of the Appellate Court wherein it remanded the cause with directions, and remand the matter to the trial court for the sole purpose of appropriately weighing the prosecutor's race-neutral explanations and direct the trial court to exercise its own discretion in determining the proper procedures at the hearing.

Respectfully submitted,

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No. 72829 - People State of Illinois, petitioner, v. Geoffrey Freeman, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 27, 1992.

91-1754

CERTIFICATE OF SERVICE

I, GLENN E. HEILIZER, an attorney, certify that I caused a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari and Motion to Proceed in Forma Pauperis to be served upon:

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by having true and correct copies thereof deposited in the U.S. Mail, in envelopes properly addressed and with sufficient postage affixed thereto, at One IBM Plaza, Chicago, IL, this 3rd day of June 1992. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Glenn Heilizer
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